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BROOKS KUSHMAN P.C. 1000 TOWN CENTER TWENTY-SECOND FLOOR SOUTHFIELD, MI 48075			EXAMINER PERREAULT, ANDREW D	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* FRANZ LINDLBAUER

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Appeal 2010-002207  
Application 10/598,848  
Technology Center 3700

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Before STEFAN STAICOVICI, GAY ANN SPAHN, and  
MICHAEL C. ASTORINO, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 10-20. Claims 1-9 have been cancelled. We have jurisdiction over the appeal under 35 U.S.C. § 6(b). We REVERSE.

## REJECTIONS

Claims 10-20 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 10-20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Combrink (US 5,493,844, issued Feb. 27, 1996), Barnes (US 4,672,684, issued Jun. 9, 1987) and Scoville (US 4,596,696, issued Jun. 24, 1986).

## CLAIMED SUBJECT MATTER

Claim 10 is representative of the subject matter on appeal, and with emphasis added, recites:

10. A multilayer, self-sealing packaging sack, comprising a broad front side and a broad rear side joined by first and second narrower side areas, and closed at an upper end and a lower end, an opening for filling being free at the upper end, the packaging medium having an inner wall made of air-permeable material surrounded by an outer wall of air-impermeable material, wherein

a) on at least one of the front side and the rear side, the *outer wall* overlaps a subregion of up to 50% of the total area of the respective side to form an *overlap region* having an inner surface and an outer surface of the outer wall,

b) in the overlap region, the inner surface of the outer wall is perforated,

c) at edges of the overlap region, the edges of the inner and outer surfaces of the outer wall lying one above the other are joined to each other by means of seams forming joints,

d) at one or both edges of the overlap region, the joint on the respective edge is interrupted over a continuous region which covers 10 to 50% of the total length of the joint to form an interruption through which gas exiting the sack through perforations can pass,

e) 10 to 50% of the area of the overlap region is provided with perforations, and

f) a distance of 0.5 to 10 cm from the edges of the overlap region at which the joint is interrupted is maintained free of perforations, such that upon filling of the sack, the two layers lying one above the other in the overlap region bear against each other forming a self-sealing seal.

## OPINION

### *The Written Description Requirement*

The Examiner determines that the originally filed specification does not contain the “self-sealing limitation” added to claim 10, and is impermissible new matter. Ans. 3. We understand the reference to the “self-sealing limitation” of claim 10 to refer to the following: “self-sealing packaging sack” in the preamble of the claim; and “such that upon filling of the sack the two layers lying one above the other in the overlap region bear against each other forming a self-sealing seal” in paragraph f).<sup>1</sup> See also App. Br. 5, Reply Br. 2. The “Appellant argues that claim 1 [*sic* 10] is supported by the original specification[,] which states that ‘the opening in the overlap region is closed by the inherent weight of the filled packaging medium.’” Reply Br. 2; see App. Br. 5, citing Spec. 4:32-37.

To satisfy the written description requirement, “the [original] specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed.” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

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<sup>1</sup> The majority of the quoted terms from claim 10 were introduced in an amendment to claim 10 filed September, 18, 2008.

The Examiner determines that the “Appellant’s specification requires that the packaging medium must be filled by an unspecified material in order to close an opening of an overlap region.” Ans. 8. The Examiner further determines that “claim 1 [*sic* 10] does not claim a filling material within the sack and therefore there is no inherent weight within the claimed sack to self-seal it.” Ans. 8. However, the self-sealing limitation is a functional limitation (*see* Reply Br. 3-4), and a patent applicant is free to recite features of an apparatus either structurally or functionally. *See In re Swinehart*, 439 F.2d 210, 212 (CCPA 1971) (“[T]here is nothing intrinsically wrong with [defining something by what it does rather than what it is] in drafting patent claims.”). The Appellant’s disclosure in the original Specification at page 4, along with Figures 1 and 2 and their associated description, reasonably conveys to those skilled in the art that the Appellant had possession of the claimed subject matter as of the filing date. *See Ariad* at 1351.

Thus, the rejection of claims 10-20 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is not sustained.

#### *The Obviousness Rejection*

All of the pending claims call for a multilayer sack including an outer wall with an overlap region having 10 to 50% of the area of the overlap region provided with perforations. *See* App. Br., Claims Appendix.

The Appellant contends that Combrink discloses that 100% of the overlap region 13 is perforated. App. Br. 9, 11; *see* Combrink, col. 5, ll. 57-60, figs. 1-3. The Examiner finds Combrink discloses a multilayer sack 22' having perforations 20 in 10-50% of the area of the overlap region 13. Ans.

4, 9-10; *see* figs. 2, 3. Further, the Examiner finds that “[t]he overlap region 13 comprises equally sized layers 14 (50% of 13) and 15 (50% of 13), of which only 14 is perforated; therefore, 10-50% of the overlap region is perforated.” Ans. 10. In other words, this finding necessitates that the Examiner considers the area of overlap region 13 of Combrink to include the overlapping areas of both inner layer 14 and outer layer 15, and since only inner layer 14 is perforated, the Examiner concludes that 10-50% of overlap region 13 is perforated. This finding is inconsistent with the ordinary meaning of the term “overlap”<sup>2</sup> and the Appellant’s Specification.

The area of overlap region 13 in Combrink is represented by the area common to inner layer 14 and outer layer 15. Hence, the area of overlap region 13 can either be the area of inner layer 14 that is common (overlapping) with outer layer 15 or *vice versa*, but not both, as the Examiner proposes.

This interpretation is consistent with Appellant’s Specification which describes overlap region 11 as outer layer 10b placed over inner layer 10a. Spec. 2: 10-17. Thus, since Combrink discloses that inner layer 14 is provided in overlap zone 13 with perforations 20, we agree with Appellant that in contrast to claim 10, Combrink discloses that 100% of the overlap region 13 is perforated. App. Br. 9. *See also*, Combrink, col. 5, ll. 57-60 and fig. 1.

The Examiner also includes findings from Scoville and Barnes (*see* Ans. 6-7, 8-9, 11), but does not find that either Barnes or Scoville discloses a

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<sup>2</sup> An ordinary and customary meaning of the term “overlap” is “to occupy the same area in part.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10<sup>th</sup> Ed. 1997).

multilayer sack including an outer wall with an overlap region having 10 to 50% of the area provided with perforations, as called for by the claims. As such, the Examiner's rejection does not articulate how the disclosures of Scoville and Barnes might remedy the deficiency of Combrink, as discussed *supra*.

Thus, for the foregoing reasons, the Examiner's rejection of claims 10-20 as unpatentable over Combrink, Barnes, and Scoville is not sustained.

#### DECISION

We REVERSE the rejection of claims 10-20 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

We REVERSE the rejection of claims 10-20 under 35 U.S.C. § 103(a) as unpatentable over Combrink, Barnes, and Scoville.

#### REVERSED

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